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IN THE

**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1922.

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WABASH RAILWAY COMPANY,  
Petitioner,  
vs.  
MILES ELLIOTT,  
Respondent.

226  
No. 648.

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On Writ of Certiorari to Kansas City Court of Appeals,  
State of Missouri.

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**BRIEF FOR PETITIONER.**

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**STATEMENT.**

This case is before the Court on writ of certiorari to the Kansas City Court of Appeals of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Livingston County, in that state, in favor of respondent, Miles Elliott, as petitioner or movant in the cause wherein Bessie

G. Welker, administratrix of the estate of Mern G. Welker, deceased, was plaintiff and Wabash Railway Company was defendant. The said suit was instituted and said judgment entered against petitioner while its railroad and properties were under Federal control.

The facts out of which the controversy arose are as follows:

On April 2, 1918, while the railroad properties of petitioner were in the possession of the Federal Government, and being operated by the Director General of Railroads, pursuant to the proclamations of the President and the provisions of the Federal Control Act, one Mern G. Welker, a brakeman, then in the employ of the Director General, was killed at Shenandoah, Page County, Iowa, while engaged in the performance of his duties as such employe and under circumstances which were alleged to create a legal liability for his death. Soon thereafter letters of administration on his estate were duly granted by the Probate Court of Shelby County, Missouri, to his widow, Bessie G. Welker.

At the time of the fatal accident, Mern G. Welker resided in Shelby County, Missouri, and at the time of the filing of the main case against petitioner, hereinafter mentioned, the plaintiff therein, Bessie G. Welker, as such administratrix, resided in said Shelby County (Rec., pp. 3, 24, 79).

On May 17, 1918, Bessie G. Welker, as such administratrix, entered into a contract with Miles Elliott (respondent herein), an attorney at law, to represent her in investigating and settling, or compromising, her supposed cause of action against petitioner on account of the alleged wrongful death of her husband, and agreeing to pay Elliott 50 per cent of all moneys received, whether by suit or compromise (Rec., p. 28).

On May 24, 1918, Elliott caused to be served on one W. R. Stepp, station agent of the Director General at Chillicothe, Livingston County, Missouri, a notice addressed to "Wabash Railway Company" reciting the substance of his contract with said administratrix (Rec., p. 29).

On June 5, 1918, Elliott, as attorney for said administratrix, caused to be filed in the Circuit Court of Livingston County, Missouri, the case in which Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, was plaintiff, and the Wabash Railway Company, petitioner herein, was sole defendant, to recover damages on account of the alleged wrongful death of her deceased husband, on April 2, 1918 (Rec., p. 24).

On November 16, 1918, one C. G. Williamson, a claim agent, then employed by the Director General in his operation of the Wabash Railroad, settled and compromised the said alleged cause of action and paid

in settlement thereof the sum of \$4,000.00 as damages, and the sum of \$162.85 to cover funeral expenses. The said sum was paid to said administratrix by a bank draft drawn on the Third National Bank of St. Louis, Missouri, which bore the superscription, "United States Railroad Administration, W. G. McAdoo, Director General of Railroads," and was signed, "Wabash R. R., Federal Account, F. L. O'Leary, Federal Treasurer" (Rec., p. 66).

Thereupon the said administratrix executed and delivered to the said representative of the Director General a formal release of all claims and causes of action "by reason of injuries received by Mern G. Welker, brakeman on freight train, extra 2155, running between Stanberry, Missouri, and Council Bluffs, Iowa, such injuries resulting in his death at Shenandoah, Iowa, on or about the 2nd day of April, 1918." Said release also acknowledged the receipt by said administratrix "of W. G. McAdoo, Director General of Railroads, the sum of \$4,000.00, in full for the above agreement as recited" (Rec., p. 72).

After such settlement was made, and on January 11, 1919, Miles Elliott, the respondent herein, filed in the case brought by the administratrix against petitioner, and then pending in the Circuit Court of Livingston County, Missouri, a motion entitled, "Motion to Enforce Attorney's Lien," in which he prayed said Circuit Court to have his lien or claim for attorney's fees

under the provisions of Section 691, Revised Statutes of Missouri, 1919, adjudged and enforced against your petitioner, who was, at that time, the sole defendant in the suit (Rec., p. 27).

Section 691, Revised Statutes of Missouri, 1919, is as follows:

"In all suits in equity and in all actions or proposed actions at law, whether arising ex contractu or ex delicto, it shall be lawful for an attorney at law, either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action, or at any stage after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or defendants, or proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service of said notice as a lien upon the claim or cause of action, and upon the proceeds of any settlement thereof for such attorney's portion or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the parties

either before suit or action is brought, or before or after judgment therein, and any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as hereinabove provided between such attorney and his client."

On March 7, 1919, Elliott filed in said suit in said Circuit Court an amended motion to declare and enforce his supposed attorney's lien by making Walker D. Hines, Director General of Railroads, a joint defendant with petitioner in such proceeding. This amended motion recites that during all the times therein mentioned the Wabash Railway Company and its railway were under the administration and control of the United States Railroad Administration and of the United States Director General of Railroads, under and by virtue of the Federal Control Act and other acts, and the proclamations of the President, dated December 26, 1917, and April 11, 1918, and that Walker D. Hines is Director General of Railroads under authority of such acts of Congress and proclamations of the President; that by his

General Order No. 50, the Director General of Railroads on November 1, 1918, ordered that he be made a party to all suits then pending against railroads upon any cause of action arising since December 31, 1917; that the action herein is such a suit (Rec., p. 31).

To Elliott's amended motion petitioner and the Director General of Railroads filed separate pleas in abatement and to the jurisdiction of the Circuit Court of Livingston County, Missouri, upon the grounds (1) that said suit was instituted against petitioner in violation of General Order No. 50 of the Director General; and (2) that the Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine said suit for the reasons that Mern G. Welker, the deceased employe, was at the time of his alleged wrongful death a resident of Shelby County, Missouri, that the cause of action arose in Page County, Iowa, and that the plaintiff administratrix was, during all said times, a resident of Shelby County, Missouri, and therefore the filing of the said suit in the Circuit Court of Livingston County, Missouri, is contrary to, and in violation of, General Orders Nos. 18 and 18a of the Director General of Railroads, made and issued on April 9, 1918, and April 18, 1918, respectively (Rec., pp. 35, 36, 37, 38).

Upon the trial of the issues raised by Elliott's amended motion in the said suit in the Circuit Court of Livingston County, Missouri, the Court found the

issues in favor of Elliott, and rendered judgment in his favor and against petitioner in the sum of \$4,162.85; and, at the same time, found the issues in favor of the Director General of Railroads and against Elliott and rendered judgment in favor of said Director General (Rec., p. 39).

After unsuccessful motions for new trial and in arrest of judgment filed by petitioner, it perfected its appeal to the Kansas City Court of Appeals of the State of Missouri, and said cause was submitted to said Court of Appeals for decision at the March Term, 1921.

Thereafter on March 23, 1921, the said Court of Appeals rendered its opinion and judgment in said cause affirming the judgment of the Circuit Court of Livingston County, both as to the judgment against petitioner and as to the judgment in favor of the Director General (Rec., p. 3, et seq.).

In due time petitioner filed in said cause in said Court of Appeals, its motion for a rehearing which was by the Court overruled on June 27, 1921 (Rec., p. 17). Thereupon petitioner filed in said cause in said Court of Appeals its motion to transfer the said cause to the Supreme Court of the State of Missouri, which was by the Court overruled on July 7, 1921 (Rec., p. 21). In due time, and in accordance with local practice, petitioner filed in the Supreme Court of the State of Missouri its petition for writ of certiorari, wherein



petitioner prayed the said Supreme Court to require the record in said cause of action in said Court of Appeals to be certified to it for review and decision (Rec., p. 113). Thereafter, and on October 29, 1921, the Supreme Court of the State of Missouri entered its order denying said petition for certiorari (Rec., p. 122), and thereby the judgment of the Kansas City Court of Appeals in said cause became, by virtue of the statutes of the State of Missouri, the final judgment of the highest court of said state.

Thereafter on December 13, 1921, petitioner filed in this Honorable Court its petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri for a review and determination of said cause in accordance with the provisions of Section 237 of the Judicial Code as amended. Said petition was granted on January 25, 1922, the writ of certiorari was issued in the usual form to the said Kansas City Court of Appeals, and due return thereon was filed in this court on February 24, 1922.

## BRIEF OF THE LAW.

### I.

The Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the suit filed therein against petitioner during Federal control by Bessie G. Welker, administratrix, or by Miles Elliott, as petitioner or movant in said suit, because the said suit was instituted against petitioner upon a cause of action arising out of the operation of petitioner's railroad during Federal control and in violation of the provisions of General Order No. 50 of the Director General of Railroads, which said order was in full force and effect at the time Miles Elliott, respondent herein, filed in said suit his petition or motion for the enforcement of his alleged attorney's lien.

Missouri Pacific Railroad v. Ault, 256 U. S. 554;

Alabama and Vicksburg Railway Company v. Journey (No. 55, decided by this Court November 7, 1921).

### II.

The Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the

cause of action arising out of the death of Mern G. Welker, caused by the alleged negligence of the Director General of Railroads, because (1) the alleged wrongful death occurred and the alleged cause of action arose at Shenandoah, Page County, Iowa, during Federal control; (2) deceased at the time of his death resided in Shelby County, Missouri; and (3) plaintiff administratrix, at the time the cause of action accrued and at the time the said suit was filed in the Circuit Court of Livingston County, Missouri, was a resident of Shelby County, Missouri, and, therefore, the venue of said suit was laid (June 5, 1918) in the Circuit Court of Livingston County, Missouri, in violation of General Order of the Director General of Railroads No. 18, dated April 9, 1918, and General Order No. 18a, dated April 18, 1918.

Alabama and Vicksburg Railway Company v.  
Journey, *supra*.

### III.

The jurisdiction of the Circuit Court of Livingston County, Missouri, to hear and determine respondent's petition or motion filed in the Bessie Welker case necessarily depended upon the jurisdiction of said Circuit Court to hear and determine the main case. Respondent was merely an intervener in that suit.

Krippendorf v. Hyde, 110 U. S. 276;  
Rouse v. Letcher, 156 U. S. 50.

IV.

There was no cause of action against petitioner growing out of the death of Mern G. Welker caused by the alleged negligence of the Director General of Railroads, his agents or servants, while operating the railroad of the petitioner, and, therefore, respondent Elliott could not have, or have enforced, an attorney's lien upon a cause of action which did not exist.

Missouri Pacific Railroad v. Ault, *supra*.

## ARGUMENT.

The Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the suit filed therein on June 5, 1918, against petitioner during Federal control, by Bessie G. Welker, administratrix, or by Miles Elliott, as petitioner or movant in said suit, because the said suit was instituted against petitioner upon a cause of action arising out of the operation of petitioner's railroad during Federal control, and Elliott's motion was filed therein in violation of the provisions of General Order No. 50 of the Director General of Railroads.

The petition filed in the Circuit Court of Livingston County, Missouri, by Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, against Wabash Railway Company, petitioner herein, shows upon its face (Rec., p. 24), that plaintiff's decedent on April 2, 1918, was killed at Shenandoah, Page County, Iowa, while engaged in his duties as a brakeman upon the freight train then being operated over the line of the Wabash Railroad; that the plaintiff in said suit was the widow and administratrix of the estate of Mern G. Welker under letters issued by the Probate Court of Shelby County, Missouri. The courts take judicial notice of the fact that the Wabash

Railroad, and all other principal lines of railroad in the United States, were taken under Federal control pursuant to the provisions of the President's proclamation of December 26, 1917, and the provision of the Federal Control Act of March 21, 1918.

Section 10 of the Federal Control Act permitted the enforcement of liabilities against carriers while under Federal control only "in so far as not inconsistent \* \* \* with any order of the President."

General Order No. 50 of the Director General of Railroads (Rec., p. 78) duly ordered "that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person or to loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control and operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding, but for Federal control, might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures."

This order further provided that all actions and suits then pending against any carrier company for a cause of action arising since December 31, 1917, based

upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismiss the company therefrom.

This general order was in full force and effect at the time Elliott, the respondent herein, filed his petition or motion, in March, 1919, in the case of Bessie G. Welker, administratrix, etc. v. Wabash Railway Company in the Circuit Court of Livingston County, Missouri. To Elliott's amended motion, filed in said suit, both the railway company, petitioner herein, and the Director General of Railroads, filed their separate pleas in abatement and to the jurisdiction of the Circuit Court of Livingston County upon the ground, among others, that said proceeding in said court was in violation of the provisions of said General Order No. 50 of the Director General (Rec., pp. 35, 36, 37). By these separate pleas and by Elliott's amended motion (Rec., p. 31) the Circuit Court of Livingston County was fully advised of the fact that at the time of the fatal accident to Mern G. Welker, the Wabash Railroad was in the possession of, under the control of, and being operated by the Director General of Railroads pursuant to the proclamations of the President, and the terms of the Federal Control Act. Said Circuit Court was also thereby fully advised respecting the terms and provisions of General

Order No. 50 of the Director General of Railroads, yet, notwithstanding the provisions of said General Order, and the permission therein given to plaintiff, Bessie G. Walker, and to her attorney, Miles Elliott, respondent herein, they did not elect to substitute the Director General of Railroads as the party defendant in said suit and dismiss as to Wabash Railway Company, but, on the contrary, elected to make the Director General a joint defendant with the Railway Company by the amended motion filed by Elliott on March 7, 1919.

It seems obvious that under the provisions of General Order No. 50 of the Director General, the Circuit Court of Livingston County had no jurisdiction to proceed further in said cause against the Wabash Railway Company, petitioner herein, after the Director General was made a party defendant therein by the amended motion or petition filed by Elliott. The requirement of General Order No. 50 is explicit that if, and when, the Director General is made a party defendant to a suit then pending against the carrier company, the Court must dismiss the carrier company out of the suit. However, the Circuit Court of Livingston County, Missouri, and the Kansas City Court of Appeals, in its opinion affirming the judgment of said Circuit Court, held that General Order No. 50 of the Director General of Railroads was invalid and ineffec-



tive. On this point the Kansas City Court of Appeals said (Rec., p. 9):

"In reference to the contention that under General Order No. 50 of the Director General of Railroads the original suit of the administratrix against the Wabash Railway Company was improperly brought against the Railway Company instead of against the Director General, there is much conflict of authority as to whether said order is effective to require suits to be brought against the Director General, some cases holding that they must be brought in that manner on the ground that the Railway Company cannot be held liable for the acts or neglect of his servants or agents, but not on the ground that the Director General can deprive the courts of jurisdiction to determine whether the Railway Company in suits against it can be held for the acts or neglect of servants or agents of the Director General \* \* \* The order in effect declares 'carriers' not responsible for the conduct of the Director General and his agents. We will hereafter point out that the Director General has no right to issue orders limiting the jurisdiction of the courts. The courts still may lawfully issue and have served process to bring the Railway Company into court even though the petition bases the cause of action on the negligence of the servants of the Director General."

The foregoing opinion of the Kansas City Court of Appeals is squarely in conflict with the decisions of

this Court, rendered in *Missouri Pacific v. Ault*, 256 U. S. 554, and in Case No. 55, October Term, 1920, *Alabama and Vicksburg Railway Company v. Journey*, decided November 7, 1921.

In the former case this Court fully sustained the validity of General Order No. 50. In the course of the opinion it was there said (l. c. 561):

“All doubt as to how suits should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name.

“As the Federal Control Act did not impose any liability upon the companies on any cause of action arising out of the operation of their systems of transportation by the Government, the provision in Order No. 50, authorizing the substitution of the Director General as defendant in suits then pending, was within his power; the application of the Missouri Pacific Railroad Company that it be dismissed from this action should have been granted.”

It is clear that by the rule declared in the *Ault* case the application of petitioner, raised by its plea in abatement and to the jurisdiction of the Circuit Court of Livingston County, to be dismissed from the action should have been granted, and, therefore, the judgment against it should be reversed.

## II.

The Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the cause of action arising out of the alleged wrongful death of Mern G. Welker while in the employ of the Director General of Railroads, because (1) the alleged wrongful death and the alleged cause of action arose at Shenandoah, Page County, Iowa, during Federal control; (2) deceased at the time of his death resided in Shelby County, Missouri; and (3) plaintiff administratrix, at the time the cause of action accrued and at the time the said suit was filed (June 5, 1918) in the Circuit Court of Livingston County, Missouri, was a resident of Shelby County, Missouri, and, therefore, the venue of said suit was laid in the Circuit Court of Livingston County, Missouri, in violation of General Order of the Director General of Railroads No. 18, dated April 9, 1918, and General Order No. 18a, dated April 18, 1918.

As heretofore stated, the petition filed by the administratrix in the principal cause showed on its face that her decedent was killed at Shenandoah, Page County, Iowa, on April 2, 1918, as the result of the alleged negligence of the agents and servants of the Director General; and it is conceded of record that plaintiff's decedent, Mern G. Welker, at the time of his death, was a resident of Shelby County, Missouri,

and that at the time the suit was filed in the Circuit Court of Livingston County, Missouri, the plaintiff administratrix was a resident of Shelby County, Missouri, and acting therein pursuant to letters of probate granted by the Probate Court of said Shelby County (Rec., pp. 3, 24, 79).

To Elliott's amended motion, filed in the principal cause in the Circuit Court of Livingston County, Missouri, the railway company, petitioner herein, and the Director General filed their separate pleas in abatement and to the jurisdiction of the court, and therein set up, among other things, the provisions of General Orders Nos. 18 and 18a of the Director General. These orders were introduced in evidence (Rec., p. 77) and the trial court was requested by each of the defendants to make the following declaration of law upon the facts conceded of record (Rec., p. 105):

"The Court declares the law to be that it is admitted in this case Mern G. Welker, the husband of Bessie G. Welker, received the injuries which resulted in his death at Shenandoah, in the State of Iowa; that, at the time of his death, the said Mern G. Welker was a citizen and resident of Shelby County, Missouri, and the plaintiff, Bessie G. Welker, administratrix of the estate of said Mern G. Welker, deceased, was, at the time of his death, and at the time of the commencement of this suit, a citizen and resident of said Shelby County, Missouri; that such being the ad-

mitted facts, this suit was improperly brought in Livingston County, Missouri, and that therefore the Circuit Court of Livingston County, Missouri, acquired no jurisdiction of the cause."

But the trial court refused to so declare the law and this ruling was sustained by the Kansas City Court of Appeals with the following statement (Rec., p. 11):

"It is insisted that by reason of General Order Nos. 18 and 18a, promulgated by the Director General of Railroads, providing that suits against carriers must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, the Circuit Court of Livingston County has no jurisdiction, as the plaintiff resided in Shelby County, and the cause of action arose in Iowa. The venue of transitory causes of action provided by the laws of the state could not be modified or limited by orders of the Director General as was attempted in General Orders 18 and 18a."

General Orders Nos. 18 and 18a were before this Court in the case of *Alabama and Vicksburg Railway Company v. Journey*, supra, and the terms of these orders are set out in full as a footnote to the Court's opinion. By these orders of the Director General it was required that "all suits against the carriers, while under Federal control, must be brought in

the county or district where plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

As the cause of action set up in the petition filed by the administratrix in the Circuit Court of Livingston County, Missouri, concededly accrued at Shenandoah, Page County, Iowa, and as both plaintiff's decedent and the plaintiff, administratrix, resided in Shelby County, Missouri, the Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the issues raised in the suit, because of the violation of the requirements of General Orders Nos. 18 and 18a.

This point was fully considered and decided by this Court in the *Journey* case, *supra*, and under the rule announced in that decision the judgment against petitioner should be reversed.

### III.

The jurisdiction of the Circuit Court of Livingston County, Missouri, to hear and determine respondent's petition or motion filed in the main case necessarily depended upon the jurisdiction of said Circuit Court to hear and determine the said principal cause. Respondent was merely an intervener in that suit.

It will be observed that respondent, Miles Elliott, was an intervening petitioner in the suit then pending

in the Circuit Court of Livingston County, Missouri, brought by Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased v. Wabash Railway Company. We have shown that under the decisions of this Court in the Ault and Journey cases, *supra*, the Circuit Court of Livingston County, Missouri, had no jurisdiction to determine the issues raised in the main case; and as the Circuit Court of Livingston County, Missouri, had no jurisdiction to determine the main case, it necessarily was without jurisdiction to hear and determine the issues raised by Elliott's intervening motion or petition because of the well-established rule that the jurisdiction to determine issues raised by intervening petitions or motions depends upon the jurisdiction of the Court over the issues raised in the main case.

Krippendorf v. Hyde, 110 U. S. 276;

Rouse v. Letcher, 156 U. S. 50.

#### IV.

There was no cause of action against petitioner growing out of the death of Mern G. Welker caused by the alleged negligence of the Director General of Railroads, his agents or servants, while operating the railroad of the petitioner (*Missouri Pacific v. Ault*, 256 U. S. 554), and, therefore, respondent Miles Elliott could not have, or have enforced, an attorney's lien upon a cause of action which did not exist.

This Court decided in the Ault case, *supra*, that a railroad corporation is not liable, either at common law or under the Federal Control Act, upon a cause of action arising out of the operation of its railroad by the Government, through the Director General of Railroads. Therefore, no cause of action whatever existed against petitioner by reason of the death of Mern G. Welker, occasioned by the alleged negligence of the agents and servants of the Director General while operating petitioner's railroad. It is obvious, therefore, that there was nothing upon which Elliott's supposed lien could attach as against petitioner.

The record in this cause shows conclusively that petitioner denied all liability on the cause of action set up in Bessie G. Welker's petition. That petitioner herein made no settlement of any supposed cause of action against it arising out of the death of Mern G. Welker, but on the contrary, that the Director General, through his representative, compromised and settled with the administratrix of the estate of deceased the claim for damages arising out of the alleged wrongful death of plaintiff's decedent by the payment of the sum of \$4,162.85, which sum was paid out of Federal funds by bank check or draft drawn by a Federal treasurer of the Director General, and which bore the superscription: "United States Railroad Administration, W. G. McAdoo, Director General of Railroads." Moreover, upon such payment



by the Director General, the administratrix executed and delivered to the representative of the Director General a release of all claims and demands she had as such administratrix "by reason of injuries received by Mern G. Welker, brakeman on freight train extra 2155, running between Stanberry, Missouri, and Council Bluffs, Iowa, such injuries resulting in his death at Shenandoah, Iowa, on or about the 2nd day of April, 1918;" and therein further acknowledged the receipt "of W. G. McAdoo, Director General of Railroads, the sum of \$4,000.00 in full for the above agreement as recited" (Rec., p. 72).

The dissenting opinion of Presiding Judge Trimble of the Kansas City Court of Appeals in ruling on petitioner's motion for rehearing of the case in that court so concisely and clearly states the contentions of petitioner that we take the liberty of quoting therefrom the following excerpts, taken from pages 18 and 19 of the Record:

"The contract between the attorney and plaintiff (Bessie G. Welker, Admx.), and which gives rise to the lien under Section 691 (Revised Statutes of Missouri, 1919), was to enforce a cause of action against the Wabash Railway Company and the notice given and the suit that was brought by the attorney under that contract, was given to and was brought against the said Rail-

way Company, and not against the Director General. On November 16, 1918, the Director General settled with the plaintiff, paying her the sum of \$4,000.00 in full settlement of 'all claims and demands at common law or under the laws of any state or of the United States,' which she had arising out of the said wrongful death. There can be no question whatever but that the Director General paid the money and settled the case. The settlement and release, signed by plaintiff, says he did, and the draft for the \$4,000.00, received by plaintiff in settlement of her case, shows that the money was paid by him. The former recites that the release is made 'in consideration of the sum of four thousand dollars (\$4,000.00) to me in hand paid by W. G. McAdoo, Director General of Railroads, operating the Wabash Railroad,' etc.; the draft for the \$4,000.00 bore the superscription 'United States Railroad Administration, W. G. McAdoo, Director General of Railroads,' and was signed 'Wabash R. R., Federal Account, F. L. O'Leary, Federal Treasurer.'

"Now, as I view it, the fallacy in the opinion of the majority is in holding that, because the Railway Company used the settlement made by the Director General to get the suit against itself dismissed, therefore, the company is liable to plaintiff's attorney for his fee. I do not think that this follows by any means. The Railway Company was not liable and never has, even impliedly, admitted liability.

“It is true, one need not have actual and valid cause of action against a party in order for the plaintiff’s attorney in the event of settlement before judgment, to have a lien for his fee. All that is necessary is that there be in good faith a contention or reasonable dispute about the matter. In such case if the other party settles with the plaintiff, such other party thereby impliedly admits the validity of such claims, and by the settlement precludes the possibility of litigating the issue of liability, and hence could not be allowed to assert against the attorney that there was not, in law or in fact, any liability. But that is not this case. Here the party that was sued did not settle with or pay the plaintiff. That was done by a person who was not sued, but who was liable; and the company which was sued, but was not liable, merely used the settlement made by the Director General to effect the dismissal of the case against it. There was in this no implied admission of liability on the part of the Railway Company. The release executed by plaintiff in consideration of the money paid by the Director General, who was not sued, but who was liable, extinguished or satisfied plaintiff’s cause of action; and as there remained no live cause of action in her, the defendant Railway Company had the right to the benefit of that extinguishment by having the case dismissed as to it without making itself liable for or subject to, the lien of plaintiff’s attorney for his fee.”

It is, therefore, respectfully submitted that the judgment of the Kansas City Court of Appeals in this cause should be reversed.

Respectfully submitted,

FREDERICK D. McKENNEY,  
N. S. BROWN,

Counsel for Petitioner.

October 16, 1922.